IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

Crl.Rev.Pet.No. 3214 of 2006

CRA.72/2005 of ADDL. SESSIONS COURT (ADHOC)-II, ALAPPUZHA
CC.928/1999 of JUDL.MAGISTRATE OF FIRST CLASS-II, CHERTHALA

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REVN. PETITIONER/APPELLANT/ACCUSED:

K.S. WILSON, SON OF SEBASTIAN,
DATTYASSERI, CHERTHALA SOUTH MURI,
CHERTHALA.

BY ADV. SRI.J.OM PRAKASH

RESPONDENT/RESPONDENT/STATE:

STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PP SRI.PUZHAKKARA MUHAMMED

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.P. Balachandran, J.

Crl.R.P.No. 3214 of 2006

ORDER

The petitioner is the accused in C.C.No.928/99 on the file of the Judicial First Class Magistrate's Court-II, Cherthala. He was convicted by the learned Magistrate for offence under Sections 408 and 477(A) IPC. The sentence awarded to him by the learned Magistrate is rigorous imprisonment for two years and fine of Rupees five thousand and in default to undergo rigorous for a further term of six months for offence under Section 408 IPC and rigorous imprisonment for a term of two years for offence under Section 477(A) IPC with benefit of concurrency. He challenged the conviction and sentence in Crl.A.No.72/05 before the Sessions Court, Alappuzha. The said appeal was dismissed confirming the conviction and sentence so passed against him. Hence, this revision.

2. It is contended before me by the learned counsel for the petitioner that the prosecution has miserably failed to establish that the petitioner was put in charge of cash and consequently there is no proof of entrustment and further that there is absolutely no convincing evidence to establish that he has misappropriated any amounts, so as to find him guilty of offences under Section 408 and 477(A) IPC.

3. The case had its genesis by PW1 filing a complaint before the Judicial First Class Magistrate's Court, Cherthala, which was forwarded for investigation under Section 156(3) Cr.P.C. In paragraph 3 of the complaint, it is alleged that the petitioner took charge of cash pursuant to Exhibit P1 decision of the Managing Committee of the complainant Sangham, namely, the Matsya Vyavasaya Sahakarana Sanghom, Cherthala. In cross-examination, PW1 admitted that as per exhibit P1 decision of the Managing Committee, the petitioner

was not put in charge, as per any document in writing. To the specific question whether there was any impediment in giving any such authorisation, if at all there was any decision by the Managing Committee, she has answered in the negative. There is absolutely no evidence adduced in the case to show that the petitioner was put in the know of Exhibit P1 resolution. It is also admitted by PW1 that cash is kept in the almirah and that the key of the almirah is with her.

4. Exhibit P1 resolution shows that the decision of the Managing Committee was to entrust the Clerk with the duties of cash and that the balance cash is to be kept under two locks. This also does not appear to have been carried out into practice. PW14 was the President of the complainant Society during the period from 1992 to 1998. His evidence is to the effect that the petitioner was doing the duties of Cashier and Clerk and that in the absence of the Secretary (PW1) he used to deal

with cash also. All the same, he admits in cross-examination that he has not seen any record to show that the petitioner was the Cashier. He also admits that the custodian of the records and cash of the Society is the Secretary. Thus, the evidence tendered by PWs 1 and 4 is not sufficient to establish that the petitioner was put in charge of the duties of Cashier and that he was dealing with cash matters in the Society, though it may be that in the absence of the Secretary, as spoken to by PW4, the petitioner also might have dealt with matters relating to cash.

5. Now, coming to the question of misappropriation alleged in paragraph 3 of the complaint, the allegation is that the petitioner submitted an application for availing a loan of Rupees one thousand in the name of Devassy Mariyan (PW3) and under Loan No.4907, an amount of Rupees one thousand was withdrawn by the petitioner, entering it in the ledger, for his own purposes and

thus, misappropriated an amount of Rupees one thousand. The said application is proved by PW1 as Exhibit P2 and according to her, it is signed by the said Devassy Mariyan. PW1 has deposed that with the knowledge of Devassy Mariyan the amount was being repaid in instalments. But, according to PW1, when the committee members went over to have the yield of the coconut trees taken, it was objected to by Devassy Mariyan, contending that he had not availed of any loan and he has also complained of the matter to the Society and it was then that it was understood that Devassy Mariyan had not availed of loan. But, in cross-examination, she had another version as regards how the Society came to know that Devassy Mariyan had not availed of loan. She stated that when the list of properties from where the yields from coconut trees are to be taken, the accused stated that Devassy Mariyan had not availed of loan and that, therefore, the yield was not attempted to be taken

from the coconut trees from the properties of Devassy Mariyan. If what she said is true, there was no occasion for Devassy Mariyan (PW3) to object to taking of yield from the coconut trees from the properties belonging to him on the ground that he had not availed of loan. Thus, the complainant PW1 herself has got two versions as to how the alleged misappropriation of Rupees one thousand by availing of loan in the name of Devassy Mariyan came to the knowledge of the Society. PW3 Devassy Mariyan has given evidence that he has given an application for loan and that is Exhibit P2. But, even after expiry of one or two months, he did not get the loan, but, he came into possession of funds from other sources and therefore, he informed the Society that he does not want the loan. According to him, after one year a demand was received from the Society to repay the loan amount and then he came over to the Society and informed them that he has not availed of any loan and that he has not

signed in any records. In cross-examination, he has asserted that he has not signed in the application (Exhibit P2) nor has he signed while receiving the amount and that he doesn't know to read and write. This means that he has received cash from the Society. Otherwise, he had no occasion to say that he has not signed either in the application or while receiving the amount.

6. The next item of misappropriation alleged in the complaint is from out of an amount of Rs.5,700/- in the Recurring Deposit amount of Joseph Sebastian (PW2), without his knowledge. It is alleged that an amount of Rupees five thousand was withdrawn and appropriated by the petitioner. PW1, in chief examination, has stated that an amount of Rupees five thousand has been written as debit by way of RD loan in the name of Joseph Sebastian in Exhibit P7 R.D. Register vide Exhibit P7(a) entry. It is also stated that as per Exhibit P8 voucher, an amount of Rupees five thousand is

received by the accused. In cross examination, she has stated that Joseph Sebastian is have Recurring Deposit account as also loan account. She has stated that from the Recurring Deposit, on demand being made, producing also the pass book, 90% of the deposit amount will be disbursed as loan and that there is no necessity to submit an application for sanction of loan. According to her, the fact of availing of the loan will be recorded in the R.D. Register as also in the pass book of the party. Hence, the best evidence to establish that loan had not been availed of by Joseph Sebastian is his pass book itself in relation to the R.D. That has not been produced. According to PW1, she came to know of the issue of R.D. loan while closing the cash, but she did not verify the R.D. Register, as the person, who has availed of the loan, is a Board member himself. All the same, she states that she is not having direct knowledge that the accused has misappropriated that amount. Though PW1 denies the

suggestion that the signatures in Exhibits P9 to P11 are not that of the petitioner, she has admitted that she has not seen the accused writing and that she has not received the said applications.

7. PW2 is Joseph Sebastian. He has stated that he was a committee member; that the petitioner was closing the accounts, but the Secretary is the person, who is responsible and that in the absence of the Secretary, the petitioner also will attend to that work. He has denied also the suggestion that he was withdrawing the amount and then foisting the case against the petitioner, in collusion with PW1.

8. The courts below have heavily relied on Exhibits P9 to P11 letters alleged to have been written by the petitioner/accused to fix liability in him for the amount allegedly misappropriated by him. Exhibits P9 to P11 were forwarded to the Assistant Director of Forensic Science Laboratory,

Trivandrum for expert opinion and Exhibit P19 is the report so obtained from him. Exhibits P6 and P8 were also forwarded for comparison to the expert (PW9) with also the standard writings Exhibit P20 series. PW9 has stated even in chief examination that it was not possible to arrive at a conclusion regarding the authorship of the questioned items. Hence, the report of the handwriting expert is not of any use to establish the guilt in the accused by having the handwritings and signatures in Exhibits P9 to P11 proved.

9. PW11, who was a Board member in the complainant Society from 1986 was examined to prove the handwriting of the petitioner and she has stated that the writings in Exhibits P6, P8, P10 and P11 are in the handwritings of the petitioner. In cross-examination, PW11 has stated that she does not know the handwriting of the petitioner and that she is not able to say if the handwritings in the records are written by someone imitating the

handwriting of the petitioner. Under Exhibit P16 mahazar, Exhibits P6 and P8 vouchers were taken into bandavast, witnessed also by PW6. But, according to PW6, it was being attested by him in the police station. When PW10, who was the President of the Society from 1998, was cross-examined, he was asked about Exhibits P10 and P11 letters alleged to have been written by the petitioner. He was asked as to whether he could say if Exhibits P10 and P11 letters are written by the petitioner himself. He did not give a definite answer to the question, but stated that those were entrusted with the police for evidence, but, the petitioner denied the authorship thereof.

10. PW12, the Investigating Officer, has not deposed as to when and how the standard handwriting of the petitioner was recorded. Thus, on the whole, there is absolutely no convincing evidence in the case to establish either that there was entrustment of the duties of Cashier with the

petitioner or that he has misappropriated amounts by falsifying the accounts as alleged by the prosecution. Thus, for want of convincing evidence, the petitioner should have been found entitled at least to benefit of doubt and he should have been acquitted. The conviction and sentence passed against the petitioner concurrently by the courts below, in the circumstances, is illegal, improper and irregular and deserves to be interfered with in revision.

In the result, allowing this revision, I set aside the conviction and sentence passed against the petitioner concurrently by the courts below and acquit him of the offences under Sections 408 and 477(A) IPC. His bail bond is cancelled.

9th January, 2007 (K.P.Balachandran, Judge)

tkv